

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

**COMMONWEALTH OF PENNSYLVANIA,
OFFICE OF ATTORNEY GENERAL
BY THOMAS W. CORBETT, JR., ATTORNEY GENERAL
Petitioner**

v.

NO.

M.D. 2006

**HEIDELBERG TOWNSHIP,
HEIDELBERG TOWNSHIP BOARD
OF SUPERVISORS, NORTH HEIDELBERG
TOWNSHIP, NORTH HEIDELBERG
TOWNSHIP BOARD OF SUPERVISORS,
BOROUGH OF ROBESONIA, ROBESONIA
BOROUGH COUNCIL, BOROUGH OF
WOMELSDORF, and WOMELSDORF
BOROUGH COUNCIL
Respondents**

**PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR
DECLARATORY JUDGEMENT AND INJUNCTIVE RELIEF**

The Commonwealth of Pennsylvania, by the Attorney General, brings this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief and alleges the following:

STATUTORY AUTHORITY

1. Petitioner brings this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to the “Declaratory Judgments Act”, 42 Pa.C.S. § 7531 et. seq.; Pennsylvania Rules of Civil Procedure, Rule 1602 et. seq. and 3 Pa.C.S. § 315.

JURISDICTION

2. The Court has jurisdiction of this Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief pursuant to 42 Pa.C.S. § 761, which provides jurisdiction over all civil actions or proceedings by the Commonwealth government, and 3 Pa.C.S. § 315, which provides jurisdiction over actions by the Attorney General to invalidate and/or enjoin the enforcement of an unauthorized local ordinance.

PARTIES

3. Petitioner is the Pennsylvania Office of Attorney General, an agency of the Commonwealth of Pennsylvania, whose principal business address is Strawberry Square, Harrisburg, PA 17120. Pursuant to 3 Pa.C.S. §§ 314 and 315, the Attorney General is authorized to review local ordinances and to bring actions against local government units to invalidate and/or enjoin the enforcement of unauthorized local ordinances.

4. Respondent Heidelberg Township Board of Supervisors is the duly elected governing body of Respondent Heidelberg Township, a municipal corporation and township of the second class, with offices at 11 Tulpehocken Forge Road, Robeson, Pennsylvania, 19551.

5. Respondent North Heidelberg Township Board of Supervisors is the duly elected governing body of Respondent North Heidelberg Township, a municipal corporation and township of the second class, with offices at 928 Charming Forge Road, Robeson, Pennsylvania, 19551.

6. Respondent Robesonia Borough Council is the duly elected governing body of Respondent Borough of Robesonia, an incorporated borough, with offices at 75 South Brooke Street, Robesonia, Pennsylvania, 19551.

7. Respondent Womelsdorf Borough Council is the duly elected governing body of Respondent Borough of Womelsdorf, an incorporated borough, with offices at 191 W. High Street, Womelsdorf, Pennsylvania, 19567.

FACTS

8. Respondents Heidelberg Township, North Heidelberg Township, Robesonia Borough, and Womelsdorf Borough are political subdivisions of the Commonwealth of Pennsylvania within which an Agricultural Security Area has been created pursuant to 3 P.S. § 911.

9. On or about January 10, 2004, Heidelberg Township, North Heidelberg Township, Robesonia Borough, and Womelsdorf Borough adopted the Heidelberg-North Heidelberg-Robesonia-Womelsdorf Joint Zoning Ordinance of 2004 (“Ordinance”). A copy of the Ordinance is attached as Exhibit A.

10. Section 202 of the Ordinance defines “Intensive Raising of Livestock or Poultry” as: (1) an average of 2 or more animal equivalent units of live weight per acre of livestock or poultry, on an annualized basis; or (2) 300 or more animal equivalent units on one lot, regardless of acreage.

11. Section 308(B) of the Ordinance requires a 40 acre minimum lot size for North Heidelberg Township and a 50 acre minimum lot size for Heidelberg Township.

12. Section 309(G) of the Ordinance requires a hydrogeologic study for a proposed use that will involve water usage of 10,000 gallons per day and 5,000 gallons per day in North Heidelberg Township.

13. Section 309(G) of the Ordinance states that the municipality may require the applicant to post financial security to provide alternative water supplies to a use on a neighboring lot if that use's pre-existing water supply becomes insufficient as a result of impacts from the water withdrawal.

14. Section 402(Y)(5)(a) of the Ordinance states that any building for the keeping of livestock or poultry shall not be located within: 500 hundred feet of any dwelling that existed prior to the adoption of the Ordinance; 600 feet for facilities located within North Heidelberg Township; 1,000 feet from any lot zoned Low Density Residential, Medium Density Residential, Town Center or Town Residential; and 1,200 feet from any lot zoned Low Density Residential, Medium Density Residential, Town Center or Town Residential for agricultural operations with more than 5 animal equivalent units averaged across the contiguous acreage of usage.

15. Section 402(Y)(5)I of the Ordinance requires an applicant for an intensive raising of livestock or poultry use to submit a soil and water conservation plan.

16. Section 402(Y)(5)(d)(1) of the Ordinance requires solid and liquid wastes to be disposed of in a manner that that mitigates unnecessary insect, odor and rodent nuisances and further requires submission of a written odor plan.

17. Section 402(Y)(5)(d)(6) of the Ordinance states that sufficient water supplies shall be available to serve the facility without adversely affecting the water supplies on neighboring properties.

18. Section 402(Y)(5)(f) of the Ordinance requires an applicant for an intensive raising of livestock or poultry use to provide a plan showing the method and operation to be used for the storage, processing and disposal of liquid and solid waste.

19. Section 403(D)(3)(a) of the Ordinance states that composting shall be conducted in a manner that does not create a fire, rodent or disease carrying insect hazard and does not cause noxious odors off the subject property.

20. Section 403(D)(3)(b) of the Ordinance limits composting to biodegradable vegetative material, including trees, shrubs, leaves and vegetable waste.

21. Section 403(D)(3)(e) of the Ordinance places water restrictions on composting operations.

22. On or about November 17, 2005, the operator of a normal agricultural operation in North Heidelberg Township requested that the Attorney General review the Ordinance pursuant to 3 Pa. C.S. § 314. A copy of the request is attached as Exhibit B.

COUNT I

VIOLATION OF 3 Pa.C.S. § 313

23. Petitioner incorporates paragraphs 1 through 22 as if fully set forth.

24. 3 Pa. C.S. § 312 defines an unlawful local ordinance as an ordinance enacted or enforced by a local government unit which prohibits or limits a normal agricultural operation unless the local government: (1) has expressed or implied authority under State law to adopt the ordinance; and (2) is not prohibited or preempted under State law from adopting the ordinance.

25. 3 Pa C.S. § 313 prohibits a local government unit from adopting or enforcing an unauthorized local ordinance.

26. 3 P.S. § 952 defines a normal agricultural operation as the activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock, and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is: (1) not less than ten contiguous acres in area: or (2) less than ten contiguous acres in area but has anticipated yearly gross income of at least \$10,000. The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134) known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice.

27. “Intensive Raising of Livestock or Poultry”, as defined in Section 202 of the Ordinance, is a normal agricultural operation as defined in 3 P.S. § 952.

28. Heidelberg Township, North Heidelberg Township, Robesonia Borough and Womelsdorf Borough have no express or implied authority to define, differentiate or regulate “Intensive Raising of Livestock or Poultry.”

29. The restrictions imposed by Section 402(Y)(5)I, (d)(1), (d)(6) and (f), and Section 403(D)(3)(b) of the Ordinance are preempted by State law.

30. The restrictions imposed by Sections 202, 309(G), 402(Y)(5) and 403(D) are prohibited by the agricultural protections set forth in the Right to Farm Law, 3 P.S. 952, the Municipalities Planning Code, 53 P.S. § 10603, and the Agricultural Area Security Law, 3 P.S. § 912.

31. Sections 202, 309(G), 402(Y)(5) and 403(D) of the Ordinance prohibit or limit a normal agricultural operation in violation of 3 Pa C.S. § 313.

COUNT II

VIOLATION OF THE NUTRIENT MANGEMENT ACT, 3 Pa C.S. § 501

32. Petitioner incorporates paragraphs 1 through 31 as if fully set forth.

33. The Nutrient Management Act (NMA) occupies the whole field of regulation regarding nutrient management and odor management to the exclusion of all local regulation.

34. The NMA provides that no ordinance or regulation of any political subdivision may prohibit or in any way regulate practices related to the storage, handling, land application of animal manure or nutrients or to the construction, location or operation of facilities used for storage of animal manure or nutrients or practices otherwise regulated by this chapter if the municipal ordinance or regulation is in conflict with this chapter and the regulations or guidelines promulgated under it.

35. The 500 to 1,200 foot setback requirements under Section 402(Y)(5) of the Ordinance are preempted by the NMA and are arbitrary, unreasonable and not substantially related to the health, safety, morality and general welfare of the community.

36. The setback provisions of Section 402(Y)(5) of the Ordinance conflict with and are more stringent than the various 100, 200, and 300 foot setback requirements of the NMA regulations, 25 Pa. Code § 83.351.

37. The requirement for the submission of a written odor plan in Section 402(Y)(5)(d)(1) is preempted by the NMA.

38. Section 402(Y)(5)(d)(1) and (f) of the Ordinance attempt to regulate the disposal of solid and liquid wastes in violation of the NMA.

39. Section 403(D)(3)(a) of the Ordinance attempts to regulate odor management in violation of the NMA.

COUNT III

VIOLATION OF THE DOMESTIC ANIMALS LAW, 3 Pa C.S. § 2301

40. Petitioner incorporates paragraphs 1 through 39 as if fully set forth.

41. Section 2352 of the Domestic Animal Law sets forth the permissible methods under State law for disposal of dead domestic animals and animal waste.

42. Section 2389 of the Domestic Animal Law provides that the Law preempts ordinances, resolutions and regulations of political subdivisions which pertain to the procedure for disposal of dead domestic animals and domestic animal waste.

43. The limitations on composting in Section 403(D)(3) of the Ordinance are preempted under Section 2389 of the Domestic Animals Law.

COUNT IV

VIOLATION OF THE WATER RESOURCES PLANNING ACT,

27 Pa C.S. § 3131

44. Petitioner incorporates paragraphs 1 through 43 as if fully set forth.

45. Section 3136 of the Water Resources Planning Act prohibits political subdivisions from regulating the allocation of water resources and the conditions of water withdrawal.

46. The restrictions on allocation of water resources in Sections 309(G), 402(Y)(5)I, 402(Y)(5)(d)(6), and 403(D)(3)(e) of the Ordinance are preempted under Section 3136 of the Water Resources Planning Act.

COUNT V

VIOLATION OF THE MUNICIPALITIES PLANNING CODE.

53 P.S. § 10603(h)

47. Petitioner incorporates paragraphs 1 through 46 as if fully set forth.

48. The Municipalities Planning Code (MPC) provides that zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Further, the MPC states that zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally been present unless the agricultural operation will have a direct effect on the public health and safety.

49. Sections 202, 309(G), 402(Y)(5) and 403(D)(3) of the Ordinance restrict agricultural operations in violation of the MPC.

COUNT V

VIOLATION OF THE AGRICULTURAL AREA SECURITY LAW.

3 P.S. § 911

50. Petitioner incorporates paragraphs 1 through 49 as if fully set forth.

51. The Agricultural Area Security Law (AASL) provides that every municipality or political subdivision within which an agricultural security area is created shall encourage the continuity, development and viability of agriculture within such an area by not enacting local laws or ordinances which would unreasonably restrict farm structures or farm practices within the area in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety.

52. Sections 202, 309(G), 402(Y)(5) and 403(D)(3) of the Ordinance unreasonably restrict farm structures and farm practices in violation of the AASL.

COUNT VI

VIOLATION OF THE RIGHT TO FARM LAW, 3 P.S. § 953

53. Petitioner incorporates paragraphs 1 through 52 as if fully set forth.

54. The Right to Farm Law provides that every municipality shall encourage the continuity, development and viability of agricultural operations within its jurisdiction. Every municipality that defines or prohibits a public nuisance shall exclude from the definition of such nuisance any agricultural operation conducted in accordance with normal agricultural operations so long as the agricultural operation does not have a direct adverse effect on the public health and safety.

55. Section 308(B) of the Ordinance, which requires a 40 acre minimum lot size for North Heidelberg Township and a 50 acre minimum lot size for Heidelberg Township, is in direct conflict with the Right to Farm Law, which defines a normal agricultural operation as a farm of 10 or more contiguous acres.

WHEREFORE, Petitioner prays that the Court grant the following relief:

- (a) declare Sections 202, 309(G), 402(Y)(5) and 403(D)(3) of the Heidelberg-North Heidelberg-Robesonía-Womelsdorf Joint Zoning Ordinance of 2004 null and void;
- (b) enjoin Heidelberg Township, North Heidelberg Township, Robesonía Borough, and Womelsdorf Borough from enforcing Sections 202, 309(G), 402(Y)(5) and 403(D)(3) of the Heidelberg-North Heidelberg-Robesonía-Womelsdorf Joint Zoning Ordinance of 2004; and
- (c) grant such other relief as it may deem just and proper under the circumstances.

Respectfully submitted,

THOMAS W. CORBETT, JR.
Attorney General

BY:

Michael T. Killion
Deputy Attorney General
Attorney ID # 201923

Gregory R. Neuhauser
Senior Deputy Attorney General
Attorney ID # 31485

Susan J. Forney
Chief Deputy Attorney General
Attorney ID # 27744

Office of Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 705-2331

Date: June 29, 2006

VERIFICATION

I, LOUIS J. ROVELLI, verify that the statements contained in the foregoing document are true and correct to the best of my knowledge, information and belief. I understand that false statements are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: _____

LOUIS J. ROVELLI

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NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by an attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF
YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR
TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU
CAN GET LEGAL HELP.**

Legal Referral Service
Berks County Bar Association
544-546 Court Street
P.O. Box 1058
Reading, PA 19603
(215) 375-4591

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CERTIFICATE OF SERVICE

I, Michael T. Killion, Esquire, hereby certify that service of a true and correct copy of the enclosed Petition for Review in the Nature of a Complaint for Declaratory Judgment and Injunctive Relief was delivered in person to:

Heidelberg Township Board of Supervisors
11 Tulpehocken Forge Road
Robesonia, Pennsylvania 19551

Robesonia Borough Council
75 South Brooke Street
Robesonia, Pennsylvania 19551

North Heidelberg Township Board of Supervisors
928 Charmng Forge Road
Robesonia, Pennsylvania 19551

Womelsdorf Borough Council
191 West High Street
Womelsdorf, Pennsylvania 19567

**MICHAEL T. KILLION
DEPUTY ATTORNEY GENERAL**